United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

824

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA

No. 23857

UNITED STATES OF AMERICA.

Appellee

versus

EDWARD L. WILLIAMS,

Appellant

Appeal from a Judgment of the
United States District Court for the
District of Columbia

BRIEF FOR APPELLANT

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INDEX

TABLE OF CASES

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*Cases chiefly relied upon are designated by an asterisk.

TABLE OF CASES

TABLE OF STATUTES

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*Cases chiefly relied upon are designated by an asterisk.

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BRIEF FOR APPELLANT

Statement of the Issues Presented for Review

1. Whether the Appellant was denied a fair trial where

   (a) the prosecuting attorney, in his argument to the jury improperly asserted that the police had had information which implicated the Appellant in the crime for which he was being tried;

   (b) the improper assertion of the prosecutor was based on his own personal knowledge and not upon any evidence received during the course of the trial; and

   (c) the trial judge neglected to caution the jury concerning that erroneous assertion by the prosecutor.

2. Whether, as a matter of law, the evidence was sufficient to establish the Appellant's guilt beyond a reasonable doubt where

(a) the Government's case rested on an aiding and abetting theory;

(b) the sole evidence linking the Appellant with the crime was the uncorroborated testimony of an alleged accomplice; and

(c) post trial, the accomplice recanted his trial testimony in an Affidavit, and thereafter, again under oath, impeached his Affidavit and affirmed his trial testimony.

This case was not previously before this court.

Reference to Rulings: Order denying motion to vacate sentence and set aside judgment dated 12-11-69; transcript pages 36-37, hearing on motion.

May It Please the Court

Statement of the Case

A. Preliminary Statement

This is an appeal from a judgment of the United States Court for the District of Columbia, entered on a jury verdict. The jurisdiction of this Court is invoked under Rule 37 of the Federal Rules of Criminal Procedure and Rule 4(b) of the Federal Rules of Appellate Procedure. The Appellant, Edward L. Williams, was found guilty of two counts of armed robbery (Title 22, District of Columbia Code, Section 3202) and two counts of assault with a dangerous weapon (Title 22, District of Columbia Code, Section 502). On December 3, 1969, the District Court sentenced

Williams to fifteen (15) to forty-five (45) years on each of the armed robbery counts of the indictment; and to three (3) years to nine (9) years on each of the assault with a dangerous weapon counts of the indictment, said sentences to run concurrently.

B. Statement of the Basic Facts

Appellant, Edward L. Williams, and one Samuel E. Thomas were indicted on two counts of armed robbery, two counts of robbery, and two counts of assault with a dangerous weapon. In addition, Samuel E. Thomas was also charged with carrying a dangerous weapon. Prior to the trial of this cause, the District Court granted Appellant's motion for severance. On the day of Appellant's trial, Samuel E. Thomas pleaded guilty to robbery (count two of the indictment) and the remaining counts of the indictment against him apparently were dropped (R. 106-108).*

This indictment was the result of an armed robbery which took place on or about December 12, 1968. At the trial, one Roland Baumgardt testified that he and Appellant were employees of a gasoline service station in the District of Columbia (R. 6); that at about 5:00 A.M. on December 12, 1968, he was working at the station (R. 7) when a person (later identified as co-defendant Thomas (R. 10)) approached him with pistol drawn and told him to open the gas station's safe and money drawer (R. 9, 11); that he responded that he could not open the safe

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* References to the trial transcript are denoted "R.___."

because he didn't know "the numbers" (R. 11) and that he couldn't open the drawer because the all-night manager, Mr. Byrd, who was then sleeping in another room of the station, had the key (R. 12); that he and the robber, Thomas, awakened Mr. Byrd and Thomas again demanded the money (R. 12, 31); that when Mr. Byrd handed Thomas his change carrier, Thomas shot Mr. Byrd in the side (R. 12, 22-23, 31); that Thomas removed money from the money drawer (R. 13, 33) after Mr. Byrd told Thomas that he too did not know the combination to the safe (R. 13, 33); that Thomas also took $97.00 from his (Baumgardt's) wallet (R. 14); that another man (not Appellant) accompanied Thomas (R. 16); and that thereafter, the two robbers fled (R. 33).

Samuel E. Thomas was then called to the witness stand and testified that he had known Appellant Williams (R. 40); that on December 12, 1968 there was a knock on his door at about 4:00 A. M. (R. 44); that when he answered the door he was told by a man named Warren (R. 46) that Appellant Williams (whose apparent nickname was "Woo-Woo" (R. 45) wanted to see him (R. 45); that he "looked out the door and across the street and . . . saw Williams" seated in his (Williams') car (R. 46-47); that Williams then walked to the door of the house and told him (Thomas) that "he got something sweet" (R. 47) and to get dressed and "Bring your thing with you" (R. 48); that he then got dressed, and got his pistol and got into Williams' car (R. 48-49); that the three men drove to service station where Williams worked (R. 49-50); that Williams told him "to make the man go open the safe for him which it was in the back" (R. 50); that he then entered the service station and, after unsuccessfully trying to awaken the "man asleep inside" (R. 51), he went into the back,

confronted Mr. Baumgardt with his pistol, and demanded ~~and ob-~~ tained money from him (R. 52); that he then returned to the front of the station, and woke up Mr. Byrd who handed him the change carrier (R. 52); that he demanded that Mr. Byrd open the safe and the money drawer (R. 53-54); that he then "panicked" and he "cocked the trigger back and it went off automatic" (R. 53); that during all of this time, Williams had remained in the car (R. 53); that after the shooting, he and Warren ran back to the car, Williams drove off, and they "split-up" the money (R. 54-56); and that he was arrested in January, 1969 (R. 56).

On cross-examination, Thomas stated that he had purchased the pistol from "a guy out in Maryland" (R. 60) (who Thomas refused to identify fully (R. 61); that Appellant Williams had never discussed robbing anything with him (R. 64); that he had previously told Williams that he had purchased a gun (R. 65); that when he heard the knocking at his door at 4:00 A.M. on December 12, 1968, he was still drowsy and under the influence of a half-pint of liquor (R. 66-67); that Williams never mentioned his pistol (R. 69) at his door on that night (R. 69); that he got dressed and drove off with Williams who said "Man, I got a job for you." (R. 71); that during the time he was in the service station, Williams remained in the car (R. 75); that he obtained money from two men in the service station (R. 83-86); that, in fact, he "pressed" the trigger of the gun (R. 89); that the three men split the money (R. 93); that when he was arrested in January, 1969, he denied having anything to do with the robbery (R. 101-102); that the police then told him that "they suspected [he] and Mr. Williams had pulled this robbery" (R. 103); that he

did not identify anyone but rather the police "suggested" Williams' name (R. 102, 104); and that he had understood that following his being sentenced on his plea of guilty to the robbery count of this indictment, the remaining counts of the indictment would be dismissed against him (R. 107).

Following the testimony of Samuel Thomas' mother, Detective Lewis Bernard Richardson took the witness stand. He stated that he had investigated the robbery in question and had arrested Samuel Thomas (R. 165); that, when he questioned Thomas after his arrest, he, not Thomas, brought up the name of Williams (R. 170); that he recovered the weapon from Thomas' home (R. 171); that he has been unable to locate the victim of the shooting, Mr. Byrd (R. 172).

The owner of the service station, Jessie Sampson Sizemore, testified that the Appellant worked for him for a brief period (R. 174-176); and that money was kept in his wall safe (R. 177).

Appellant Williams' defense was alibi. He, his mother-in-law and his wife testified in his behalf (R. 181-215). The Government proffered one rebuttal witness, Mr. Williams' parole officer (R. 231-245), who contradicted Williams' part of Williams' testimony.

During the prosecuting attorney's rebuttal argument to the jury, and in an apparent effort to buttress the credibility of the testimony of Thomas, the following occurred (Supplemental Transcript, pages 21-22);

> "PROSECUTOR:
>
> "* * * He [Thomas] gave these details to the police the day he was arrested before he knew he would get any consideration from the Government. And the

> police didn't feed these details to him. They didn't know all the details. They had an inkling. They had information. They were told. They let the witness Thomas know that, that this Defendant may have been involved. (Emphasis supplied)
>
> "MR. KEATS.
>
> "Objection.
>
> "THE COURT:
>
> "Sustained. There is no evidence they had any information. They had a suspicion. That is the most they had."

Because of the prosecutor's misstatement, Appellant's counsel moved for a mistrial. (Supplemental Transcript, page 23). The trial judge denied this motion stating:

> "I think I corrected it at the time. I will not grant your motion. I will deal with it in my instructions to give it further emphasis, Mr. Keats." (Supplemental Transcript, page 23)

However, in his charge to the jury, the trial judge neglected to emphasize the fact that, contrary to the prosecutor's statement, the police had no information linking Appellant to the crime (R. 264), and Appellant's trial counsel, placed on the horns of a dilemma (R. 264), chose not to press the matter (R. 264).

Following the Appellant's conviction, sentencing, and filing of a notice of appeal, his alleged accomplice and Chief Prosecution Witness, Thomas, prepared and signed an Affidavit recanting his trial testimony. Williams' trial counsel immediately moved to vacate Williams' sentence under 28 U.S.C. 2255. At the hearing on this motion, Thomas first recanted the statements contained in his Affidavit (H.M. 24)* then, on cross-examination, affirmed his Affidavit and impeached his trial testimony

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* References to the transcript of the hearing on the Motion to Vacate Sentence under 28 U.S.C. 2255 are referred to as "H.M.___".

(H.M. 27-35). On the basis of the testimony received, the trial judge denied Appellant's Motion to Vacate Sentence (H.M. 36).

ARGUMENT

I. APPELLANT WAS SEVERELY PREJUDICED WHEN, IN A CASE WHICH HINGED UPON THE UNCORROBORATED TESTIMONY OF AN ALLEGED ACCOMPLICE, THE PROSECUTOR, IN HIS REBUTTAL ARGUMENT TO THE JURY, IMPROPERLY ASSERTED THAT THE POLICE HAD INFORMATION WHICH LINKED THE APPELLANT WITH THE CRIME, A FACT NOT PROVED IN EVIDENCE

A. THE PROSECUTOR'S ASSERTION OF A "FACT" WHICH WAS KNOWN TO HIM BUT WHICH HAD NOT BEEN PROVED IN EVIDENCE WAS ERRONEOUS AND PREJUDICIAL. (With respect to this part of Appellant's argument, it is requested that the Court read especially the following pages: R. 166-170, 264)

In Berger v. United States, 295 U.S. 78, 79 L. ed. 1314 (1935), the Supreme Court of the United States reversed a conviction for conspiracy to counterfeit. In that case, which was characterized by the Court as "weak - depending, as it did, upon the testimony of . . . an accomplice with a long criminal record (295 U.S. at page 89, 79 L. ed. at page 1321), the Court's reversal was predicated upon the improprieties of the prosecuting attorney, which included suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered," and "assuming prejudicial facts not in evidence." (295 U.S. at page 84, 79 L. ed. at page 1319). After setting out in its opinion an example of the prosecutor's misconduct - his argument to the jury - the Court stated (295 U.S. at page 88, 79 L. ed. at page 1321):

> ". . . improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

In the case at bar, the record demonstrates that the prosecutor had personal knowledge that the police possessed (or at least claimed to possess) "information that both Thomas and Williams were involved" in the robbery (R. 167); that Appellant's trial counsel studiously sought to avoid all statements and inferences which would have led the jury to believe this "fact" (R. 166-170; Supplemental Transcript, page 22-23), that no evidence of any kind was introduced during the trial concerning this "fact," and that, notwithstanding the above, the prosecutor, in an attempt to support the credibility of his crucial witness, accomplice Thomas, stated:

> ". . . the police didn't feed those details into [Thomas2. They didn't know the details. They had an inkling. They had information. They were told. They let the witness Thomas know that, that this Defendant may have been involved.")Supplemental Transcript, page 22)

Although the trial court sustained an objection to this improper statement, it is submitted that the damage had been done, for as this Court stated in Garris v. United States, 129 U.S. App. D. C. 96, 390 F. 2d 862 (1968), at 129 U.S. App. D.C. 100:

> "the emphasis placed by the prosecutor upon the extra-record facts in his summation indicates his high appraisal of their importance. His own estimate of his case, and of its reception by the jury at the time, is, if not the only, at least a highly relevant measure now of the likelihood of prejudice. Taking that estimate into account, we find a new trial to be necessary."

It is elemental that closing arguments of counsel must not be based upon facts not proved. Stewart v. United States, 101 U.S. App. D.C. 51, 247 F. 2d 42 (D.C. Cir., 1957); Berger v. United States, supra; Johnson v. United States, 121 U.S. App. D.C. 19, 347 F. 2d 803 (D.C. Cir., 1965); Reichert v. United States, 123 U.S. App. D. C. 294, 359 F. 2d 278 (D.C. Cir., 1966); King v. United States, 125 U.S. App. D.C. 318, 372 F. 2d 383 (D.C. Cir., 1967); Garris v. United States, supra. This Court has, moreover, correctly noted that statements which are not based on the evidence but which, rather, amount to unsworn testimony by the prosecution, "are more prejudicial because their impact on the jury 'is always more or less strengthened by his official position'." (Stewart v. United States, supra, 101 U.S. App. D.C. at page 55). Appellant does not suggest that the prosecuting attorney in the instant case intentionally selected his improper remarks. Nevertheless, it is submitted that in a close case such as the one at bar where, as the trial court correctly pointed out, the prosecution's case "rests entirely on the testimony of Thomas," (R. 169) the improper assertion by the prosecutor of a fact within his individual cognizance was severely prejudicial. This "fact" in the minds of the jurors could well have tipped the scales in favor of a verdict of guilty.

B. THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR IN (1) FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL AND (2) FAILING TO CAUTION THE JURY TO DISREGARD THE IMPROPER ASSERTION OF THE PROSECUTOR

Although the trial judge recognized that the prosecutor's assertion of a "fact" not based upon the evidence was erroneous (Supplemental Transcript, page 22), the Court denied appellant's motion for a mistrial on the grounds that the Court thought it

"corrected it at the time," and would thereafter "deal with it in my instructions to give it further emphasis." (Supplemental Transcript, page 23). Unfortunately, the trial judge in his instructions, neglected to caution the jury to disregard the improper remarks of the prosecutor, and Appellant's counsel, on the horns of a dilemma, requested the Court not to bring up the matter separately since "it would just serve to make it stick out in their minds more" (R. 264). Thus, although the trial judge sustained Appellant's objection and stated "There is no evidence they had any information. They had a suspicion. That is the most they had." (Supplemental Transcript, page 22), the failure of the court to further instruct the jury to disregard the prosecutor's statement, as the court promised it would, substantially affected the Appellant's right to receive a verdict which was based solely on the evidence properly received during the trial. A defendant in a criminal case must be jealously protected against prejudicial statements not based upon the evidence, United States v. Sober, 281 F. 2d 244 (3d Cir. 1960). The fact that the improper statement of "fact" was inadvertent does not, it is submitted, obviate the prejudice which such a remark, coming from the prosecuting attorney, necessarily contains. Stewart v. United States, supra, United States v. Guajardo-Melendez, 401 F. 2d 35 (7th Cir., 1968).

It is respectfully submitted that the misstatement of the prosecutor, in the context of this case, was sufficiently prejudicial to necessitate a reversal in the interests of justice. The statement amounted to unsworn testimony, testimony which the jury was not specifically instructed to disregard.

II. WHERE A CONVICTION IS BASED UPON THE UNCORROBORATED TESTIMONY OF AN ALLEGED ACCOMPLICE, AND WHERE THE ACCOMPLICE-WITNESS RECANTS HIS TRIAL TESTIMONY UNDER OATH, AND LATER, AGAIN UNDER OATH, RETRACTS HIS RECANTATION AND AFFIRMS HIS TRIAL TESTIMONY, A REASONABLE DOUBT EXISTS, AS A MATTER OF LAW, AS TO THE GUILT OF THE ACCUSED.

(With respect to this part of Appellant's Argument, it is requested that the Court read especially the following pages: R. 39-111, 169; Transcript of the Hearing on the Motion to Vacate Sentence, pages 24, 26-36.)

Appellant is cognizant of the rule in this jurisdiction which permits a conviction to be sustained solely on the basis of the uncorroborated testimony of an accomplice. (See McQuaid v. United States, 91 U.S. App. D.C. 229, 198 F. 2d 987 (D.C. Cir., 1952), cert. denied, 73 S. Ct. 499, 344 U.S. 929, 97 L. ed. 715; Bishop v. United States, 100 U.S. App. D.C., 49, 269 F. 2d 240; Egan v. United States, 52 App. D.C. 384, 287 Fed. 958 (D.C. Cir., 1923). It is Appellant's contention, however, that this rule is modified in cases where, as in the case at bar, the accomplice-chief witness has made many self contradictory statements, all under oath.

It must be remembered that this was a close case; that is, the case rested "entirely on the testimony of Thomas" (R. 169). In order for the jury to convict the Appellant, it had to fully credit Thomas' testimony, since none of the other evidence offered by the Government linked Williams with this crime. Yet, this very same witness, post trial, prepared a sworn affidavit in which he retracted all of his trial testimony. Thereafter, at the hearing on Appellant's Motion to Vacate Sentence, Thomas, once again under oath, first repudiated his affidavit (H.M. 24), then reaffirmed his affidavit and again impeached his trial testimony (H.M. 26-27), and finally retracted his

affidavit and reaffirmed his trial testimony (H.M. 28-36).* It is to be noted, moreover, that when Thomas was first arrested, he denied having had anything to do with this robbery (R. 101-102). Thus, this witness has told conflicting stories six times, five of which have been related under oath.

Appellant respectfully submits that the proper rule under Federal law is that "a conviction can rest upon the uncorroborated testimony of an accomplice if it is not otherwise unsubstantial on its face." Patterson v. United States, 361 F. 2d 632 (8th Cir., 1966). And, it is further submitted that sworn testimony that is changed in its material respects over and over again is very unsubstantial. This apparently is the rule in the District of Columbia, since this Court in McQuaid, supra, specifically noted that the accomplice's testimony in that case was "clear and positive" in its critical respects." Where the accomplice's testimony is not clear and positive in its material respects, it is submitted that corroborating facts must be proven. Such has been the rule when other courts have been faced with this problem of reviewing a conviction wherein an accomplice's testimony has formed the real basis of the conviction and wherein that accomplice has given contradictory stories under oath. Thus, in the case of Jahnke v. State, 68 Neb. 154, 104 N.W. 154 (1905), the court stated:

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* The record is unclear as to whether anyone threatened Thomas into making that affidavit. It is clear, however, that Appellant Williams never threatened Thomas. (See H.M. 31-32).

> "It is true that questions of fact are to be determined by the jury, and ordinarily where there is substantial conflict in the evidence, the verdict of the jury must be conclusive; but it is a rule of law that a witness who has wilfully sworn falsely in regard to some material matter upon the trial is not to be believed upon any matters unless his testimony is corroborated." (104 N.W. at pp. 157-158).

Moreover, in Hill v. State, 55 Tex. Crim. 435, 117 S.W. 134 (1909), the court stated that it was

> unwilling to sanction a judgment upon a record of this character. The accomplice has sworn positively both ways, and in his latter statement that he had committed perjury in placing appellant at the scene of the theft, and that the truth is appellant was not there. This evidence comes in entirely too questionable shape to form the basis for the incarceration of men in the penitentiary (117 S.W. at 135).*

In the final analysis, therefore, it appears that appellate courts are justly reluctant to affirm convictions, even on jury verdicts, in the face of serious self-contradictions by chief prosecution witnesses. Indeed, this Court, in the case of Hinton v. United States, 91 U.S. App. D.C. 13, 196 F. 2d 605 (D.C. Cir., 1950), in reversing the convictions of defendant for allegedly taking immoral and indecent liberties with children,** stated (91 U.S. App. D.C. at page 14):

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* Compare Valdez v. United States, 244 U.S. 432, 61 L. ed. 1242, 37 S. Ct. 725 (1917), wherein the Court stated that an accomplice's testimony is not to be disregarded because he first testifies as to the defendant's guilt, later retracted that accusation, and later retracted the accusation, and later retracted the retraction. Note, particularly, however, (as did the Court) that in that case the guilt of the defendant did not rest alone upon the testimony of the accomplice. Indeed, evidence had been introduced which proved that the defendant had planned the murder, had given the hired accomplice the weapon used in the murder, and had hired a scout who had observed and reported to the defendant on the movement and whereabouts of the victim.

** Both children had testified against the defendant, and both children had told inconsistent stories at other times.

> We must reverse both convictions because in our opinion reasonable doubt of appellant's guilt is inescapable in each case. It is of course true that self-contradiction by the government's sole eye-witness is not always fatal to the government's case, for circumstances may prove a defendant's guilt beyond a reasonable doubt. But there are no such circumstances here. The mere fact that A and B, when on the witness stand, each stuck to one of her several different stories is not such a circumstance.

It is respectfully submitted that inasmuch as the sole evidence linking Appellant Williams with the robbery was the testimony of the alleged accomplice, Thomas, Thomas is not only an alleged accomplice, but also, the sole "eye-witness" to the Appellant's alleged role in this robbery.* As such, his numerous inconsistent sworn statements create, as a matter of law, a reasonable doubt as to Appellant's guilt (Hinton v. United States, supra), unless some other corroborative facts are proved which could sustain this conviction. Such other corroborating facts, as to the material aspects of this case, it is respectfully submitted, are lacking in this record.

CONCLUSION

For the reasons stated above, the judgment of conviction entered below should be reversed.

Respectfully submitted,

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* "Warren," the alleged third party to this crime, was never found and none of the other witnesses were able to place the Appellant at the scene of this crime.